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Ninety-nine problems (continued): Supreme Court of Canada denies leave to appeal Ontario Court of Appeal's decision in *Midwest Properties Ltd. v. Thordarson*

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On May 26, 2016, the Supreme Court of Canada denied leave to appeal the decision of the Ontario Court of Appeal in *Midwest Properties Ltd. v. Thordarson*, 2016 ONCA 819 *(Midwest)*. Accordingly, the Court of Appeal's significant decision regarding the statutory right to compensation for spills under section 99 of the Ontario *Environmental Protection Act* (EPA) remains the law of the land in Ontario.

As discussed in more detail in our previous Osler Update, "Ninety-nine problems: Ontario Court of Appeal releases significant decision for environmental civil litigation," the Court of Appeal confirmed in *Midwest* that section 99 creates a separate, distinct ground of liability for polluters that does not require a plaintiff to establish intent, fault, a duty of care or foreseeability, but instead focuses on the ownership and control of the pollutant. Furthermore, a successful claim under section 99 entitles a plaintiff to damages calculated on the basis of cost of remediating the pollution from a property, as opposed to diminution of value of the contaminated property. Finally, the Court of Appeal used the concept of ownership and/or control of a pollutant to pierce the corporate veil to hold the principal of the polluting company in *Midwest* personally liable.

With the Supreme Court effectively blessing the Ontario Court of Appeal's decision in *Midwest*, claims under section 99 of the EPA may become the primary cause of action in any contaminated lands dispute due to the preferable and expansive treatment of damages (i.e., the cost of restoration) that section 99 unlocks. However, given the fairly egregious facts of *Midwest*, this debate may be far from settled.